THE SUPREME COURT OF APPEAL
**REPUBLIC OF SOUTH AFRICA**

# JUDGMENT

Reportable

CASE NO: 296/06

In the matter between :

**RADIO PRETORIA** Appellant

and

**THE CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA** First Respondent

and

**THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA** Second Respondent

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| **Before:** | **HOWIE P, STREICHER, BRAND JJA, HANCKE & MUSI AJJA** |
| **Heard:** | **4 MAY 2007** |
| **Delivered:** | **8 JUNE 2007** |
| **Summary:** | **Administrative law – refusal of broadcasting licence reviewed – application not properly considered.** |
| **Neutral citation:** | **This judgment may be referred to as *Radio Pretoria v The Independent Communications Authority of South Africa* [2007] SCA 90 (RSA)** |

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**STREICHER JA**

**STREICHER JA:**

[1] This is an appeal against the dismissal by the High Court, Pretoria of an application by the appellant for the review of a decision by the second respondent not to grant the appellant a community broadcasting licence.[1] The court a quo granted the appellant leave to appeal to this court. The main contention of the appellant on appeal is that the second respondent's refusal of its application for a broadcasting licence should be set aside in that the second respondent treated the appellant's application as an application for a licence to broadcast to a certain area whereas the application was for a licence in respect of a different area.

[2] The second respondent, the Independent Communications Authority of South Africa ('Icasa'), is a juristic person established in terms of s 3 of the Independent Communications Authority of South Africa Act 13 of 2000 ('the Icasa Act'), to perform, with effect from 1 July 2000, the duties imposed upon the Independent Broadcasting Authority ('IBA') by or under the Broadcasting Act 4 of 1999 and the Independent Broadcasting Authority Act 153 of 1993 ('the IBA Act').[2] For this purpose all the powers conferred upon the IBA in terms of the IBA Act were conferred on Icasa.[3] Included among these is the power to administer the statutory scheme for the granting, renewing and amending of broadcasting licences.[4]

[3] Section 39 of the IBA Act provides that subject to the provisions of the Act, a person shall not provide a broadcasting service unless such service is provided under and in accordance with a broadcasting licence issued to that

[1] The judgment of the court a quo is reported as *Radio Pretoria v Voorsitter van die Onafhanklike Kommunikasie-owerheid* [2006] 1 All SA 143 (T).
[2] Section 4 of the Icasa Act. The Independent Broadcasting Authority was established in terms of s 3 of the IBA Act and was, with effect from 1 July 2000, dissolved in terms of s 18 of the Icasa Act.
[3] Section 4 of the Icasa Act.
[4] Section 13(1)(a) of the IBA Act.

person by the IBA under Chapter VI (sections 39 to 55) of the IBA Act. The Chapter makes provision for the issuing of various types of broadcasting licences. One such licence is a community broadcasting licence.[5]

[4] Acting in terms of section 41 of the IBA Act the IBA, on 9 May 1997, in terms of a notice published in the Government Gazette[6], invited applications for broadcasting licences to provide community sound broadcasting services. The notice stated that the IBA decided to produce an interim community radio frequency plan ('the RFP') on a province by province basis, containing all FM and MW frequencies that were available for community broadcasting in all nine provinces until such time as the national frequency plan had been finalised.[7] According to the RFP each province was divided into numbered licence areas indicated on an index map and the frequencies, the maximum effective radiated power ('the ERP') of the transmitter and the maximum permissible effective antenna height that could be used from each such licence area were specified. Applicants had to perform a coverage study from the proposed transmitter site and a copy of such coverage study had to accompany each application. The target area to which an applicant wanted to transmit had to be identified and well defined as this target area or part of it was to form part of the licence conditions. Transmitters had to be so located as to ensure that the target area and licence area overlap. An application form was provided and applicants were required to answer all the questions set out in the form. Under the heading 'Licence(s) Applied for' an applicant had to specify the licence area, band, frequency, maximum ERP and maximum effective antenna height. Applicants were also

[5] Section 47 of the IBA Act.
[6] Notice no 785 of 1997 published in Government Gazette 17998.
[7] As from 28 January 1994 all powers, functions and duties in relation to the administration, management, planning and use of the broadcasting services frequency bands devolved upon or vested in the IBA (s 29(1)). As soon as reasonably practicable after the commencement of the IBA Act the IBA had to prepare a frequency plan whereby the maximum number of frequencies available for broadcasting services was determined. (s 31).

required to provide particulars of the geographic target area ‘including a map showing predicted 66, 60 and 48 dBuV/m coverage contours’.

[5] From the aforegoing it is clear that a distinction is drawn in the RFP, the invitation and the application form between licence areas and target areas. The licence area referred to in the RFP, the invitation and the application form is the area from which the broadcasting on the prescribed frequency could take place ie the site where a transmitter complying with the prescribed parameters could be located. The target area in terms of these documents, on the other hand, is the area to which the applicant wishes to broadcast. However, in terms of s 1 of the IBA Act ‘licence area’ is defined as ‘the geographical target area of a broadcasting service as specified in the relevant broadcasting licence’. It follows that the ‘licence area’ referred to in the invitation and in the prescribed application form, is not to be equated with ‘licence area’ within the meaning of the IBA Act. It is the target area to which the applicant wishes to broadcast that is to be equated with such ‘licence area’. In order to avoid confusion I shall henceforth refer to the licence areas contemplated in the RFP, the invitation and the application form as RFP licence areas.

[6] A community and a community broadcasting service are defined in s 1 of the IBA Act as follows:

‘“community” includes a geographically founded community or any group of persons or sector of the public having a specific, ascertainable interest.’

‘”community broadcasting service” means a broadcasting service which –

(a) is fully controlled by a non-profit entity and carried on for non-profitable purposes;

(b) serves a particular community;

(c) encourages members of the community served by it or persons associated with or promoting the interests of such community to participate in the selection and

provision of programmes to be broadcast in the course of such broadcasting service; and

(d) . . .'

[7] The appellant is an association not for gain incorporated in terms of s 21 of the Companies Act 61 of 1973. In 1995 a one year temporary community broadcasting licence was granted to the applicant and since that time it has been broadcasting on the frequency 104.2 MHz. Initially it did so in terms of five consecutive temporary one-year community broadcasting licences authorizing it to broadcast in Pretoria and environs. Pursuant to the invitation to apply for four year community broadcasting licences the appellant, in March 1998, applied for such a licence in respect of RFP licence area 21. Subsequently, in the light of the fact that, in terms of the RFP, frequency 104.2 MHz was only available in licence area 18, the RFP licence area applied for was changed to RFP licence area 18.

[8] In its application for a licence the appellant states:

(a) That the community it wishes to serve is the 'Boere-Afrikaner' community. He describes the Boere-Afrikaner as follows:

'Boere-Afrikaner is the conservative core of Afrikaners with the following characteristics:

- A common cultural-historical descent and heritage of some 350 years;
- A west European language and cultural heritage;
- A Protestant Christian religion and view of world affairs;
- A common goal in maintaining and promoting their cultural and religious values and identity.'

(b) That Pretoria, Johannesburg and districts is the target area to which it wishes to broadcast and that, as required by the invitation, a map showing the expected reception area is annexed to the application.

(c) That there are 546 646 Afrikaans speakers in the districts which are targeted and that they are distributed as follows:

| | | |
|---|---|---|
| Area 18 | Bronkhorstspruit/Cullinan (Source op | |
| | datum opnames) | = 18 960 |
| Area 21 | (Kleinfontein) | |
| Area 20 | | |
| Area 19 | | = 527 686 |
| Area 17 | | |
| Area 22 | | |
| Area 23 | | |
| | (Source 1996 Census) | |
| | | = 546 646' (881) |

These areas (17-23) are clearly the RFP licence areas.

[9] In the light of the fact that a broadcasting licence is issued in respect of a target area and the fact that the appellant made it clear in its application that the target area to which it wished to broadcast comprised RFP licence areas 17 to 23, the application was for a licence to broadcast to RFP licence areas 17 to 23 by way of a transmitter and antenna complying with the parameters prescribed in respect of RFP licence area 18 and located in RFP licence area 18.

[10] The hearing of the applicant's application only took place on 9 May 2003. At the hearing the appellant's representatives made it clear that appellant required a licence to broadcast to its target area and not to RFP licence area 18. Counsel for the appellant, referring to the maximum ERP of 10 000 Watt specified in the RFP for RFP licence area 18 said:

'If the maximum ERP, which has been available for a decade and which appears in the invitation to apply is to be reduced in any way, the applicant will not be able to reach its target audience in neighbouring areas and equally importantly its advertisers and debit order subscribers. . . . This will effectively mean the end of Radio Pretoria and render a four-year licence with a limited ERP to cover only the licence area quite useless.'

Mr Diedericks a member of the applicant's senior management added:

'Our target population is outside area 18. So if we are confined to area 18, you know, we're off the air in practice. Also our income is from the Pretoria area and environments. So that has been our target area and our target audience all along. If we cut down to area 18, that is as good as Mr Prinsloo has said it's just like shutting us down.'

[11] On 30 September 2003 Icasa advised the appellant that its application had been refused. In May 2004 the following four reasons for the refusal were furnished:

(a) The appellant does not comply with s 32(3) of the Broadcasting Act 4 of 1999 in that the appellant is not managed and controlled by a board which was democratically elected from members of the community in the licensed geographic area. In the entire Gauteng the appellant has only 54 members, only three of whom are from licence area 18.

(b) The appellant does not comply with Icasa's requirement that measures be taken to ensure that the people in its policy-making structures are representative of the community to be served in that only one of its ten directors emanates from the community to be served, being the Boere-Afrikaner community in licence area 18.

(c) The appellant does not comply with the standard condition, imposed by Icasa when issuing a broadcasting licence, that the licensee must ensure equal employment opportunity practices and must at all times ensure that the composition of its management and staff reflects the racial and gender demographics of the community it serves. The appellant does not comply with these requirements in that members of the Boere-Afrikaner community are employed by preference and only Boere-Afrikaners, who are inevitably white, qualify for appointment as voluntary workers.

(d) Having regard to the broadcasting services already available in the relevant licence area Icasa is not satisfied that there is sufficient need

for the applicant's service as contemplated in s 46(1)(b) read with s 47(2) of the IBA Act.

[12] The appellant thereupon applied to the court a quo for the review and setting aside of Icasa's refusal of its application. The court a quo held that Icasa's refusal to grant the applicant's licence by reason of not being satisfied that there is a need for the applicant's service was irrational and should be set aside. The correctness of this decision is not in issue before us. Nonetheless the court a quo concluded that Icasa's decision to refuse the application for the other three reasons mentioned above was well founded and dismissed the application.

[13] Before us the appellant's main submission why Icasa's decision should be reviewed and set aside is that the appellant's application was never considered by Icasa in that Icasa treated the application as an application for a community broadcasting licence in respect of RFP licence area 18 whereas the application was for a licence to broadcast to a target area comprising RFP licence areas 17 to 23.

[14] As stated above the appellant in fact applied for a licence in respect of the target areas comprising RFP licence areas 17-23. It is, however clear and indeed common cause that Icasa treated the application as one for a licence in respect of RFP licence area 18.

[15] Counsel for Icasa submits that this line of attack on Icasa's refusal of the application is not open to the appellant in that it is not one of the grounds relied upon in the appellant's founding affidavit. I do not agree. In regard to the first reason for refusal of its application by Icasa the appellant said in its founding affidavit:

'[T]he Applicant's detailed application, which served before the Respondents, makes clear provision for the fact that the target audience and broadcasting area of the Applicant extends well beyond the boundaries of licence area 18.

. . .

In this case, the "democratic" requirement lies in the election of the directors, through majority vote, from the ranks of the target audience . . ..

. . .

In the present instance, there can be no doubt that the elected Directors hail from the target broadcasting area [Boere-Afrikaners spread over most of Gauteng, and some even coming from licence area 18] . . ..

. . .

If the Directors only had to be elected from the ranks of listeners in licence area 18, it would be grossly unfair [and undemocratic] from the point of view of the hundreds of thousands of listeners in the target broadcasting area beyond licence area 18.'

[16] In regard to the second reason for Icasa's refusal of its application the appellant said that it is wrong to confine the Boere-Afrikaner community of interest to licence area 18 and that 'it also seems to suggest that the other half a million Boere-Afrikaners who form part of the target broadcasting community of the Applicant for purposes of this application, may as well not exist.'

[17] Although the appellant did not specifically say that Icasa's decision should be reviewed because it never considered its application for a licence in respect of a target area comprising RFP licence areas 17 to 23 it did say that Icasa erred in confining its application to RFP licence area 18 in that its target area is much wider. That allegation provided a sufficient basis for the submission now advanced namely that Icasa treated the application as being an application for a licence in respect of RFP licence area 18 and failed to consider the real application being an application for a licence in respect of a much wider area namely a target area comprising RFP licence areas 17 to 23.

[18] The respondents submit that the RFP is to the effect that the target area to which a licensee is entitled to transmit its signal (which it must specify in its application and which will be specified in its licence) must substantially be encompassed by one of the numbered licence areas identified in the RFP. According to the submission the geographical parameters of a particular numbered RFP licence area circumscribe the maximum extent of the transmission area of a licensee who holds a licence in respect of that numbered licence area. The only basis advanced for this submission (apart from unsubstantiated submissions by counsel in respect of technical matters) is that the construction is consistent with the express requirement of the RFP that the transmitter should be located so as to ensure that the target area and the licence area overlap. The respondents submit that to require that these two areas overlap is to require that they substantially overlap. However, according to the ordinary meaning of the word 'overlap' the two areas need merely coincide to some extent, even a minor extent will suffice.

[19] I doubt that the RFP is to the effect that the RFP licence area and the target area in respect of which a licence is sought should substantially coincide. For each RFP licence area the RFP prescribes the maximum power of the transmitter and the maximum height of the antenna that may be used. In the case of RFP licence area 18, transmission by way of such a transmitter and antenna would reach a much wider area comprising various other RFP licence areas. It would make no sense to require a broadcaster to apply for a separate licence, to transmit on a different frequency, in respect of each of those areas. It seems to me that Icasa's interpretation of the RFP is wrong. However, this is not an issue to be decided at this stage. The appellant's application was not refused for this reason as its application was not treated as an application in respect of the target area identified by it. The appellant is

entitled to have its application considered by Icasa and only when that is done will it be necessary to determine whether Icasa's understanding of the RFP is correct.

[20] The respondents also submit that Icasa's reasons for refusing the appellant's application for a licence applied with equal force to an application by the appellant for a licence in respect of the target area identified in its application and that the application for the review of Icasa's decision should, in any event, for this reason not have succeeded. The submission is wrong in that some of the reasons do not apply with equal force to an application for a licence in respect of the target area. It is, in any event, no answer to the appellant's complaint to say that the reasons for the dismissal apply with equal force to an application for a licence in respect of the appellant's target area. The appellant is entitled to have its application considered by Icasa. Icasa failed to consider the appellant's application for a community broadcasting licence in respect of the target area identified by it and by treating it as an application for a licence in respect of RPF licence area 18 it acted so unreasonably and irrationally that its decision should be set aside.[8]

[21] The court a quo should therefore have reviewed and set aside Icasa's refusal of the appellant's application and should have referred the matter back to Icasa for reconsideration.

[22] In the light of the fact that the appellant's application will be reconsidered by Icasa the following additional comments should be made in respect of the reasons furnished by Icasa for the refusal of the application:

(a) Icasa interpreted s 32(3) of the Broadcasting act 4 of 1999 so as to require that the board which manages and controls the licensee of a community broadcasting service must be democratically elected *by*

[8] See s 6(2)(f)(ii) and (h) of the Promotion of Administrative Justice Act 3 of 2000.

members of the community in the licensed geographic area, whereas the section requires that such board must be elected *from* and not *by* such members.[9] Furthermore, the people taking part in the democratic election cannot be the community being served by the applicant for a broadcasting licence as was thought to be the case by Icasa. In terms of the definition of a community broadcasting service in s 1 of the IBA Act, the licensee must be fully controlled by a non-profit entity. Unless the members of the appellant's board are elected by the members of the appellant the broadcasting service cannot be said to be fully controlled by the appellant.

(b) Icasa required equal employment opportunity practices in the sense that all races should be given an equal opportunity to be employed by the appellant and also required a composition of management and staff which reflects the racial and gender demographics of the community the appellant serves. These requirements are contradictory in that, by definition, the community served by the appellant does not include all races.

[23] As a consequence of the refusal of the appellant's application for a community broadcasting license an application by the appellant for a signal distribution licence was refused. The appellant asked that, in the event of the application for the setting aside of the refusal of the former application being successful, the refusal of the latter application also be set aside and referred back to Icasa for reconsideration. The respondents did not object to this request.

[24] For these reasons the following order is made:

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[9] Section 32(2) and (3) of the Broadcasting Act 4 of 1999 read as follows:
'(2) The licence of a community broadcasting service must be held by a licensee.
(3) The licensee referred to in subsection (2) must be managed and controlled by a board which must be democratically elected, from members of the community in the licensed geographic area.'

(1) The appeal is upheld with costs including the costs of two counsel.

(2) The order of the court a quo is set aside and replaced with the following order:

(a) The second respondent's refusal of the applicant's application for a community broadcasting licence and the applicant's application for a signal distribution licence are set aside and the applications are referred back to the second respondent for reconsideration.

(b) The respondents, jointly and severally, are ordered to pay the costs of the application.

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P E STREICHER
JUDGE OF APPEAL

CONCUR:

HOWIE P)
BRAND JA)
HANCKE AJA)
MUSI AJA)